

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PERRY SMITH and	:	
KEVIN CLEVELAND	:	NO. 04-CR-472

MEMORANDUM

Gene E.K. Pratter, J.

November 16, 2004

INTRODUCTION

Defendant Kevin Cleveland¹ moves to dismiss the indictment in this matter on the grounds that the United States of America subjected the Defendants to lengthy and oppressive pre-trial incarceration, denying them their right to a speedy trial. The crux of the Defendants' argument is that they have been incarcerated by the Commonwealth of Pennsylvania and/or the United States of America for over a year without the opportunity for a trial, and, they argue, the cause of this delay was the United States of America. Specifically, the Defendants contend that the delay of six months prior to the Defendants' federal arrest was the result of unspecified dealings between the state and federal prosecutors and that the delay of four months after the initial federal arrest until the federal arrest under the current indictment was caused by the United States and was unjustified.

Although the Defendants have not specifically delineated a separate due process claim, the Court notes that delays prior to a federal arrest raise due process issues rather than a

¹ Defendant Perry Smith has since joined in this motion.

constitutional speedy trial claim, as outlined in at least one case cited by Defendants. Therefore, the Court will consider both the Defendants' implied claim of a violation of the due process clause and their explicit claim of violations of the speedy trial clause and the Speedy Trial Act. However, as discussed below in further detail, the Court finds that no evidence was presented during the evidentiary hearing conducted in this matter to support the Defendants' assertions, and this Motion will be denied.

I. BACKGROUND

As developed during the evidentiary hearing, the Defendants Perry Smith and Kevin Cleveland were arrested by the Philadelphia police on August 14, 2003, pursuant to state charges. They were held in custody by the Commonwealth of Pennsylvania, until turned over to federal authorities pursuant to federal arrest warrants issued on February 17, 2004. The United States petitioned on February 26, 2004 that the Defendants be released into federal custody on March 22, 2004 for an initial appearance. However, the Defendants were turned over early, and Smith was arrested by the United States on March 16, 2004, and Cleveland was arrested on March 19, 2004.

The United States filed an indictment against both Defendants on April 20, 2004. This indictment would have been filed within thirty days of the arrest of the Defendants, if the Defendants had been turned over on March 22, 2004. However, because the Defendants were turned over early, the indictment ran afoul of the thirty-day rule of the Speedy Trial Act. 18 U.S.C. § 3161(b). The United States filed a superceding indictment on July 6, 2004, but filed a Motion to Dismiss the Superceding Indictment Without Prejudice on July 16, 2004. That Motion was granted by the Honorable Mary A. McLaughlin on July 19, 2004, who dismissed the

indictment without prejudice.

On July 20, 2004, new federal arrest warrants were issued and executed against Smith and Cleveland. A new indictment against both Defendants was filed on August 17, 2004, twenty-eight days after the July 20, 2004 arrest. It is this indictment that is currently before the Court.

II. STATEMENT OF LAW

Under the Speedy Trial Act, 18 U.S.C. § 3161(b), the government must file an indictment within thirty days of a federal arrest. United States v. Benitez, 34 F.3d 1489, 1493 (9th Cir. 1994). A trial must commence within seventy days of the later of the filing of the indictment or the defendant's first appearance. 18 U.S.C. § 3161(c)(1). Certain delays are excluded in computing the time. 18 U.S.C. § 3161(h). If the case is dismissed without prejudice and then similar charges are filed against the same defendants, as is the case here, the time periods under subsections (b) and (c) of the Speedy Trial Act begin to run anew. 18 U.S.C. § 3161(d)(1); United States v. May, 771 F.2d 980, 982 (6th Cir. 1985).²

Delays that occur pre-arrest do not apply to the speedy trial right guaranteed by the Sixth Amendment. United States v. Lovasco, 431 U.S. 783, 788 (1977). Delays prior to arrest may

² Finding no controlling authority from the Third Circuit Court of Appeals, the Court adopts the reasoning of the Court of Appeals for the Sixth Circuit that the plain meaning of the language of 18 U.S.C. § 3161(d)(1) ("If [an indictment] is dismissed or otherwise dropped... the provisions of subsections (b) or (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information") requires that the clock begins anew after a dismissal without prejudice and a new arrest and indictment. May, 771 F.2d at 982. This same reasoning has been adopted by the Courts of Appeal for the First, Fifth, Seventh, Eleventh, and D.C. Circuits. United States v. Nesbitt, 852 F.2d 1502, 1513 (7th Cir. 1988); United States v. Hutchins, 818 F.2d 322, 326 (5th Cir. 1987); United States v. Dorman, 752 F.2d 595, 597-98 (11th Cir. 1985); United States v. Bittle, 699 F.2d 1201, 1205-07 (D.C. Cir. 1983); United States v. Krynicki, 689 F.2d 289, 292-95 (1st Cir. 1982).

rise to a due process claim under the Fifth Amendment, but a defendant must show that the delays were deliberately caused by the government and that the delay actually prejudiced his defense in order for the court to recognize such a claim. United States v. Beckett, 208 F.3d 140, 150-51 (3d Cir. 2000).

In determining whether a delay between arrest and trial is prejudicial, the court must determine if the delay is “presumptively prejudicial.” United States v. Dent, 149 F.3d 180, 184 (3d Cir. 1998). If the delay is “presumptively prejudicial,” the court will then balance four factors to determine if the defendant has been deprived his speedy trial rights. Barker v. Wingo, 407 U.S. 514, 533 (1972). Those factors are (1) length of the delay; (2) reason for the delay; (3) defendant’s assertion of his speedy trial right; and (4) prejudice to the defendant. Id. For the reasons discussed below, the Court finds no violation of Defendants’ due process rights, their right to a speedy trial under the Sixth Amendment, or of the Speedy Trial Act.

III. DISCUSSION

In the present case Defendants Perry Smith and Kevin Cleveland were arrested on three separate occasions for the same alleged offenses. Defendants were first arrested by the Commonwealth of Pennsylvania on August 14, 2003. The United States of America arrested the Defendants on two separate occasions. The first federal arrests occurred on March 16, 2004 for Smith and March 19, 2004 for Cleveland. The second federal arrests occurred on July 20, 2004 for both Defendants.

The Court will only consider the delays related to the federal arrests, since the Defendants did not raise a due process claim implicating the first state arrest nor did the Defendants show that the delay from August 14, 2003 to March 16, 2004 was deliberately caused by the United

States.³ See Beckett, 208 F.3d at 150-51 (holding delays prior to arrest are due process violations only if the defendant can show the delays were deliberately caused by the government and prejudiced the defendant's defense). Therefore, the issue is whether any delay since the Defendants were arrested by the federal authorities, on March 16 for Smith and on March 19 for Cleveland, is a violation of the Speedy Trial Act.

The indictment pertaining to these first arrests was dismissed without prejudice on July 19, 2004. The Defendants were then arrested again by the United States on July 20, 2004 and charged with similar offenses. Under subsection (d) of 18 U.S.C. § 3161 the Speedy Trial Act, the computation of the time limits for the filing of an indictment and a trial commenced anew when the initial indictment was dismissed without prejudice and similar, but new, charges were filed against Smith and Cleveland. 18 U.S.C. § 3161(d)(1). The new speedy trial clock began on July 20, 2004. The indictment filed on August 17, 2004 was within the required thirty-day time period. See 18 U.S.C. § 3161(b) (stating "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested"). The scheduled trial of the Defendants also appears to be timely, since the "speedy trial clock" has been suspended due to the Defendants' filing of pretrial motions. 18 U.S.C. § 3161(h)(1)(F).

The remaining issue is whether the pre-trial delay from March 16, 2004 until July 20, 2004 was a violation of the Defendants' constitutional speedy trial or due process rights. The

³ The delay from the issuance of the federal arrest warrants on February 17, 2004 and the actual arrest of the Defendants on March 16 and 19 apparently was the result of delays in transferring the Defendants from state custody to federal custody, and Defendants presented no evidence that this was a deliberate attempt by the United States to delay this matter or was the result of callous indifference or similar conduct by federal authorities.

Court finds that neither right was violated for either of the Defendants. This delay was not a speedy trial delay, since the Court does not find a delay of four months to be “presumptively prejudicial” to the Defendants. See Dent, 149 F.3d at 184 (holding that the Court must first find a delay is “presumptively prejudicial” and most courts find that a one year or longer delay satisfies this requirement). Similarly, the delay was not a due process violation inasmuch as half of the four-month delay, from May 19, 2004 to dismissal of the initial federal claims on July 19, 2004, was the result of the Court reviewing the Defendants’ own pretrial motions, not the deliberate actions of the government, and the Defendants have failed to show in what manner they have been prejudiced by the passage of the other two months. See Beckett, 208 F.3d at 150-51 (holding a defendant must show that a delay was deliberately caused by the government and prejudicial to his case in order to make out a claim under the due process clause).

IV. CONCLUSION

For the foregoing reasons, the Court denies Defendant Kevin Cleveland’s Motion (joined in by Defendant Perry Smith) to Dismiss Indictment for Lack of Speedy Trial. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

Gene E.K. Pratter, J.

November 16, 2004

AND NOW, this 16th day of November, 2004, upon consideration of Defendant Kevin Cleveland's Motion to Dismiss Indictment for Lack of a Speedy Trial (Docket No. 38), the arguments related to the above Motion in Defendant Perry Smith's Motion to Join Motion of Defendant Cleveland to Demand a Speedy Trial Rights and to Dismiss for Lack of Jurisdiction (Docket No. 45), the government's Memorandum in Response to Defendants' Motions to Dismiss the Indictment Without Prejudice (Docket No. 57), the testimony and arguments presented at the evidentiary hearings on October 21, 22, and 26, 2004, and the Court's conclusion that there is no evidence supporting the Defendants' assertions that the United States of America deliberately caused any pre-trial delay,

It is hereby ORDERED that Defendant Kevin Cleveland's Motion to Dismiss Indictment for Lack of a Speedy Trial (Docket No. 38) is DENIED.

BY THE COURT:

S/Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE